United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-6079

To be argued by
LOUIS G. CORSI

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 75-6079

B
P/S

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and THE CITY OF NEW YORK,
Plaintiffs-Appellees,

—against—

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,
Defendant-Appellant,

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE . . . SHEET METAL AND AIR CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., etc.,
Defendants.

LOCAL 28,
Third-Party-Plaintiff,

—against—

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
Third-Party-Defendant.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,
Fourth-Party-Plaintiff,

—against—

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
Fourth-Party-Defendant.

BRIEF FOR PLAINTIFF-APPELLEE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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BRIEF FOR PLAINTIFF-APPELLEE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Preliminary Statement

This case is on appeal from an Opinion and Order of the United States District Court for the Southern District of New York (Werker, J.), dated July 18, 1975, as amended, and the District Court's subsequent Order and Judgment entered on September 2, 1975, as amended. The District Court found, after a three-week trial, that Defendant-Appellant Local 28 of the Sheet Metal Workers' International Association ("Local 28") and Defendant Local 28 Joint Apprenticeship Committee ("JAC")* have engaged in a pattern and practice of discrimination in violation of the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (" Title VII"); upon that finding the District Court ordered certain injunctive and equitable relief.

Notwithstanding the broad language of Local 28's amended Notice of Appeal (150a-51a),** Local 28, in its brief, has focused on only two aspects of the decision below: Whether it was proper for the District Court to (a) set a goal of 29% non-white *** membership in Local 28 by July 1, 1981, such goal to be implemented by a court-appointed administrator and with a preference in admission to non-whites, and (b) direct Local 28 to appoint a non-white as one of the three union-designated trustees of the JAC.

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* JAC has not filed a Notice of Appeal, and therefore, it has been erroneously denominated as a "Defendant-Appellant" in the caption on Local 28's brief. Although counsel for Local 28 purports to maintain this appeal on behalf of the three union trustees of the JAC, there is no basis for such action since the trustees were not sued in their individual capacities.

To the extent that any issues regarding JAC or the apprenticeship program are raised on this appeal, Local 28's standing as to those issues is not challenged by the Plaintiff-Appellee Equal Employment Opportunity Commission ("EEOC").

** "a" refers to the Joint Appendix in this action.

*** "Non-white" refers to Black and Spanish-surnamed individuals.

The EEOC has filed a cross-appeal (1225a-26a) challenging the propriety of the standards set by the District Court for entitlement of victims of discrimination to back-pay awards.*

Questions Presented

1. Given the unchallenged findings and conclusions of the District Court that Local 28 and JAC have engaged in a long-standing and consistent policy of discrimination against the admission of non-whites into the union and its apprentice program, was it within the District Court's discretion to set a goal of 29% non-white membership in Local 28 and its apprentice program by July 1, 1981, to be implemented under the direction of a court-appointed administrator and with a preference for the admission of non-whites?

2. Given the unchallenged findings and conclusions of the District Court of a long history of discrimination in the operation of the Local 28 apprentice program, was it within the District Court's discretion to direct, in conjunction with other equitable and remedial relief, that Local 28 appoint a non-white as one of the three union-designated trustees of JAC and require that a non-white hold that position until at least July 1, 1981?

3. Did the District Court err in ruling that only those victims of discrimination for whom there exist records of application for direct entry into Local 28 are eligible to apply for awards of back pay?

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* In its Notice of Appeal, the EEOC also challenged the District Court's findings regarding the use by Local 28 and JAC of arrest record data. Since Local 28 and JAC have subsequently agreed to revise their practices in this regard, the arrest record issue will neither be briefed nor argued by the EEOC.

Statement of Facts

On this appeal, Local 28 has chosen not to challenge the findings of the District Court and has made only passing reference to the record. By so doing Local 28 has attempted to relegate this record to insignificance and thereby rewrite more than thirty years of its history. This attempt has failed. The District Court's conclusions as to Local 28's and JAC's long history of discrimination against non-whites in violation of Title VII are fully substantiated by the trial record. Moreover, this history of discrimination, as well as its invidious nature and continuing effects, are an ample predicate for the relief ordered by the Court.

A. Background

Local 28 is an unincorporated association of journeymen sheet metal workers performing building and construction sheet metal work in the five boroughs of New York City. (Opinion, Findings ##1 & 2, 72a; Stipulation of Facts, ¶1, 1060a.) As of July 1, 1974 there were 3,670 journeymen and 286 apprentices in Local 28. (Stipulation of Facts, ¶¶29 and 60, 1070a and 1076a.) As such, Local 28 is the largest labor organization in the sheet metal industry in New York City and its members are employed on most major construction involving sheet metal in the City. (804a; 1217a-24a; 538a.)

Members of Local 28 will not work with sheet metal workers who are not members or apprentices of Local 28 or do not have a Local 28 "identification slip", *i.e.*, "permit." (Opinion, Finding #5, 73a.) Indeed, the approximately 133 contractors who have collective bargaining agreements with Local 28 * have been warned repeatedly by officers and business agents of Local 28 that "When

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* Stipulation of Facts, ¶7, 1063a.

you hire someone not in Local 28 be sure you hire enough to do all your work." (535a.) Thus, despite a contract provision granting Local 28 contractors autonomy in hiring (1286a), the contractors have hired only Local 28 sheet metal workers, or individuals holding Local 28 permits (Opinion, Finding #5, 73a; Stipulation of Facts, ¶8, 1064a) and Local 28 has thereby been able to exercise decisive control over the major employment opportunities arising in the sheet metal industry in New York City.

In addition to Local 28's power to control employment opportunities in the industry, other substantial and unique benefits accrue to its virtually all-white membership. The rate of pay, welfare and pension benefits, as well as the working conditions for members of Local 28, are far better than those provided to members of other sheet metal unions located in New York City. (331a; 954a-55a; Opinion, 92a.) For instance, as of July, 1974, members of Local 28 were earning $12.05 per hour, whereas members of the Blowpipe Division of Local 400, Sheet Metal Workers' International Association ("Local 400 Blowpipe Division") were earning only $7.10 per hour. Similarly, members of Local 295 of the Operating Engineers (Sheet Metal Workers) earned only $4.60 per hour.* (Opinion, n. 18, 118a.)

B. Pattern and Practice of Discrimination

In its brief, Local 28 asserts that it has not intentionally discriminated against non-whites, and indeed, claims that the District Court made no findings of intentional discrimination. (*E.g.*, Brief on Behalf of Local 28, pp. 8, 10, 16, 19.) Although intent to discriminate is not an essential predicate for relief in a Title VII case (*see* dis-

* Significantly, non-whites have historically composed the majority of the membership in Local 400 Blowpipe Division and Local 295 (Sheet Metal Workers). (Opinion 92a, 98a; 379a; 1200a-10a.)

cussion *infra* Point I), the union's denials are totally without foundation and can be made only by ignoring the voluminous record and plain language of the District Court's Opinion and Order.

1. Racial History of Local 28 and Its Apprentice Program

Local 28 is virtually all-white, and has been so throughout its history. As of July 1, 1974, 117 or 3.19% of the members of Local 28 were non-white. (Opinion, Finding # 8, 74a; Stipulation of Facts, ¶ 60, 1075a-76a.) Similarly, only 40 or 13.99% of the apprentices in the Local 28 apprentice program were non-white. (Opinion, Finding # 17, 76a; Stipulation of Facts, ¶ 29, 1069a-70a.)*

Historically, the number of non-whites in Local 28 has been even lower: Only one or two blacks could be identified as having been members of Local 28 prior to 1969; indeed, between 1964 and 1969 there were no black journeymen.** (888a-89a; 933a-34a; Stipulation of Facts, ¶ 102, 1094a; Minutes of Local 28 Membership and Executive Board Meetings*** dated August 1, 1963, 1025a.) Likewise, only 12 Spanish surnamed individuals

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* Included in this total are 6 non-whites who were indentured pursuant to the District Court's Order dated April 9, 1974. (47a-49a.)

In addition, pursuant to that Order and a subsequent Order dated July 2, 1974 (30a-32a) concerning which plaintiffs and the State Division of Human Rights (the "State") initiated a contempt proceeding against Local 28 and JAC in October, 1974 (20a-56a; Opinion, 105a; Record herein, P. Exh. 60), 34 additional non-whites were to be indentured in the Local 28 apprentice program. These 34 individuals are not included in the above totals.

** Records for prior periods are not available. (Stipulation of Facts, ¶ 102, 1094a.)

*** Hereinafter "Minutes".

have been identified as ever being members of Local 28 prior to 1969. (Stipulation of Facts, ¶¶ 60 and 102, 1075a-76a, 1094a.) No Black had ever been enrolled in the Local 28 apprentice program prior to 1965, and at least during the period from January 1, 1960 through March 15, 1965, only one Spanish surnamed individual was enrolled. (889a; 933a; 956a; Stipulation of Facts, ¶ 29, 1069a-70a.)

Despite a judicial finding in 1964 that Local 28 and JAC had engaged in a pattern of discrimination against blacks and a State Court order requiring Local 28 and JAC to end their discriminatory selection and admission policies,* the enrollment of non-whites in Local 28 and its apprentice program has remained at only token levels. (Stipulation of Facts, ¶¶ 29, 60 and 102, 1069a-70a, 1075a-76a, 1094a.) This continuing pattern of meagre non-white participation can be attributed to neither color-blind misfortune nor chance. Indeed, only policies and practices designed and intended to exclude non-whites adequately explain these statistics.

2. Constitutional Exclusion and Nepotism

Prior to November, 1946, the Constitution and Ritual of the Sheet Metal Workers' International Association—the governing instrument of Local 28 **—contained the following provision:

> "Where a sufficient number of eligible negro applicants are available they may be organized with the consent of the affiliated white local union as an auxiliary thereto . . ."

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* *See* pp. 8-10, *infra.*

** Stipulation of Facts, ¶ 10, 1064a.

Further, this provision mandated that such an "auxiliary" was to be:

> "subordinate to the established and affiliated white local union and shall be represented by said white local union at all conferences and conventions. . . . The same initiation, re-initiation and reinstatement fees shall apply to auxiliary members and the privilege of transfer shall be limited to transferring from one auxiliary to another auxiliary." (Opinion, Finding #4, 72a; Stipulation of Facts, ¶ 72, 1078a-79a; 916a; 917a.)

The evidence makes clear that Local 28 has always been the "white local union" authorized by this provision. Although the historical absence of non-whites described above undoubtedly supports this conclusion, statistics are not the only evidence. Indeed, the pattern of purposeful discrimination made plain in this record led the District Court to characterize Local 28 as the "white 'A' local" in New York City. (Opinion, Conclusions ##3-6, 102a-103a.)

For instance, until recently, Local 28, with the acquiescence of JAC, fostered and maintained its "white 'A'" character by exercising arbitrary control, through a system of nepotism, over admission to the apprentice program. An investigation of this admission procedure by the State Commission for Human Rights (the "State Commission") in 1963 resulted in the first judicial finding of discrimination against Local 28 and JAC. *State Commission for Human Rights* v. *Farrell*, 43 Misc. 2d 958, 252 N.Y.S. 2d 649 (Sup. Ct. N.Y. Cty, 1964).

As made clear during the State Commission's investigation, the apprentice program has historically been the

primary source of journeymen for Local 28*, and prior to 1965 the selection of apprentices was solely within the province and authority of Local 28. (Opinion, 79a.) John Mulhearn, Recording Secretary of Local 28, testified before the State Commission that:

> "I take the applications and I appoint the boys, period." (919a; *see* 920a-23a, 926a.)

He further testified that this absolute power had been exercised by Local 28 for a great many years, and with the complete acquiescence of the JAC. (922a-24a.) Moreover, the basic selection criterion applied by Local 28 was the applicant's relationship to, or friendship with, union members. (State Commission's Order, ¶¶ 54-57, 1280a; 929a-30a.)

This admission system, the State Commission found, operated to exclude non-whites in several ways. Just within a few years of the inception of the State Commission's investigation several black applicants had been discriminatorily denied admission to the apprentice program. (State Commission's Opinion, 1264a; State Commission's Order, ¶ 65, 1281a.) In addition, since Local 28 has historically had an all-white membership, the State Commission concluded that reliance on family ties as the primary criterion for admission had the effect of completely barring blacks from the apprentice program, and ultimately, Local 28. (State Commission's Order, ¶ 59, 1281a).**

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* Approximately 90% of Local 28's present journeymen members are graduates of the apprentice program. (1235a; *see also* Stipulation of Facts, ¶ 15, 1066a.)

**With one exception not relevant here, the findings of the State Commission were affirmed. *State Commission for Human Rights* v. *Farrell*, 43 Misc. 2d 958, 252 N.Y.S. 2d 649 (Sup. Ct. N.Y. City, 1964.)

As a result of the proceedings before the State Commission, and the litigation before the New York State Supreme Court, Local 28 and JAC were ordered to implement an objective apprentice testing and selection procedure, the content of which was embodied in the Corrected Fifth Draft of Standards for the Admission of Apprentices (the "Corrected Fifth Draft).* As expressed by the State Court, it was hoped that this procedure would create "a truly non-discriminating union." *State Commission for Human Rights* v. *Farrell, supra*, 43 Misc. 2d at 969, 252 N.Y.S. 2d at 660.

Despite this hope, as Judge Werker concluded, it was not long before Local 28

> "flaunted the court's mandate by expending union funds to subsidize special training sessions designed to give union members' friends and relatives a competitive edge in taking the JAC battery." (Opinion, 104a).

Robert Schluter, a member of Local 28 and presently training coordinator for the apprentice program, testified that "somebody in the administration of Local 28" instructed him to initiate a training program to be financed by Local 28 and subsidized by the use of JAC facilities for relatives and friends of Local 28 members. (189a-92a.) As part of that program, Schluter "urged the members to go out and bring our boys in so they can be trained for the test." (Minutes dated September 7, 1967, 1035a.) At a subsequent meeting of the Executive Board,

> "Bro. Mulhearn requested the Ex Board to extend to him the privilege of hiring 2 teachers to

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* The Corrected Fifth Draft is printed as Appendix A to the Court's opinion in *State Commission for Human Rights* v. *Farrell, supra.*

> conduct and prepare a class of our boys for the apprentice test and that Local 28 stand the expense that may occur and if at any time we need another instructor or two that he will have the power to employ them. Request was granted." (Minutes dated September 21, 1967, 1036a.)*

It cannot be doubted that this program was conceived and designed to preserve the "white 'A'" character of Local 28. Certainly, it conformed to neither the spirit nor the letter of the mandate in *State Commission for Human Rights* v. *Farrell, supra.***

3. Local 28's Refusal to Organize the Blowpipe Workers in New York City

At about the time of the State Court decision ordering Local 28 to end its discrimination against blacks, the International Association of Sheet Metal Workers (the "IA"), with which Local 28 is affiliated, requested Local 28 to organize the sheet metal workers employed in so-called "blowpipe shops" in New York City. (958a-60a.) The sheet metal work performed in these shops was substantially the same as that performed in Local 28 shops (Opinion, 92a-93a; 964a-65a; 396a-418a; 470a-73a; 487a-92a; 550a-51a); likewise, the skills, tools and machines needed for the sheet metal work performed in both types of shops are the same. (557a-70a; 581a-82a; 631a-39a; 650a.) Just as the work jurisdiction of Local 28 is considered that of a "building trade local," so too is the work jurisdiction of blowpipe shops. (896a-901a; 906a; 377a.) Because of these similarities, Edward F. Carlough, Pres-

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* That decision was subsequently ratified by the general membership. (*Id.*)

** For the full history of Local 28's and JAC's litigation resulting from the State Commission's administrative proceeding see the cases cited at paragraph 28 of the Stipulation of Facts, 1069a.

ident of the I.A. at that time and a former president of Local 28 (868a-70a), concluded that Local 28 "is where [the blowpipe workers] should have went." (881a.)

Nonetheless, Local 28 refused to organize these workers. (959a-60a; Minutes dated December 17, 1964, 1027a; Minutes dated January 6, 1965, 1028a-29a; 904a-05a.) Significantly, of the approximately 250 to 360 sheet metal workers employed in these blowpipe shops at that time, 60% to 75% were non-white. (357a-58a, 379a; Opinion, 98a.)

The "official" reason given by Local 28 for refusing to organize the blowpipe workers despite insistent pressure from the IA * and Local 28 contractors ** was that the blowpipe contractors could not meet Local 28's wage scale. Under its collective bargaining agreement, Local 28 asserted, it was prohibited from giving those contractors a lower wage rate and thereby accepting a wage differential for its members. (Opinion, 98a-99a.) As the District Court noted, this proferred rationale is contradicted by the dual wage structure that Local 28 has historically maintained within the union. (Opinion, n. 24, 119a; *see* 196a-198a; 453a; 963a.)

Moreover, the "unofficial" reason for Local 28's refusal which was "common knowledge in the industry" (463a), was that Local 28 did not want "to take those damn minorities into the Local. . . ." (422a-23a.) The evidence led the District Court to conclude that "[t]here appears to be no other reason for the union's refusal."

> "In organizing an entire industry it would not have been able, as with individual shops, to admit

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* *See* 420a-21a; Minutes dated Jan. 6, 1965, 1029a.

** *See* 419a; 445a, 448a-49a.

only white workers and exclude non-white employees." (Opinion, 99a.)*

Subsequently, and in spite of Local 28's objection,** the IA organized the blowpipe workers and assigned them to Local 400, a "production" local union in New York City affiliated with the IA. (372a-75a, 388a-90a; 874a-75a, 883a-85a; 1162a.) In order to accommodate the work jurisdiction of these blowpipe workers, Local 400 was required to form a Blowpipe Division and institute an apprentice program which was essentially a duplication of Local 28's program. (Stipulation of Facts, ¶ 75, 1079a; 890a-95a; 911a-13a; 1145a-58a; 352a-62; 377a-79a; 555a-71a; 581a-82a; 631a-40a; 645-50a.) Indeed, as with Local 28, the Blowpipe Division was classified by the IA as a building trade local (896a-901a; 906a; 352a) and its

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* This conclusion by the District Court and the supporting evidence puts to rest the assertion made by Local 28 in its Brief that:

> "The [District Court] did not find that Local 28 had intentionally discriminated, but rather, found only that the effect of its policies and practices had a discriminatory impact on non-whites." (p. 8.)

** Mell Farrell, president of Local 28, made it clear to the IA that by organizing the blowpipe shops the IA would be infringing on the traditional work jurisdiction of Local 28. Indeed in a letter to the IA, Farrell declared:

> "On behalf of the Officers and Members of Local Union No. 28 I vigorously protest the action of our International Association in subverting the interests of our Local Union, the infringements on the traditional rights of the Members of Local 28 in the manufacturing and erection of duct work in connection with Blowpipe and Dust Collecting Systems, the erection of Spray Booth Systems, Smoke Houses, Ovens and other areas of jurisdiction, and the possible effect of the action of our International Association on the future collective bargaining agreements with our Contractors Associations . . .". (905a.)

See also Minutes dated Dec. 17, 1964, 1027a; Minutes dated Jan. 6, 1965, 1029a.

members were given "official receipts from the regular receipt book" (906a) rather than "production receipts" issued to the production workers of Local 400. (907a-08a.)

Thus, at a time when Local 28 was already under a court order to end its discrimination against the admission of non-whites, it successfully fought to maintain its character as a "white 'A' Local", thereby forcing the creation of the "racially mixed 'B' Local" of the Local 400 Blowpipe Division. (Opinion Conclusions ## 4-6, 103a.)

4. Local 28's Continuing Exclusion of Non-whites from Employment Opportunities

From 1967 through 1972 Local 28 contractors experienced a need for sheet metal workers which the manpower of Local 28 could not fulfill. (215a-24a; Stipulation of Facts ¶¶ 64, 106 and 107, 1077a, 1096a-99a; Minutes dated August 3, 1967, 1034a; Minutes dated June 20, 1968, 1037a; Minutes dated October 16, 1969, 1044a; 424a-28a; 1132a-41a; 483a-86a; 494a-528a; 974a-92a; 1125a-29a; 1164a-89a; 539a-40a; 1238a-49a.) Indeed, as early as July 1967, even Local 28 recognized the "emergency" which this shortage had created and actually set into motion the procedures to call back to work members who were on pension.

> "The Ex Board also recommends that the officers of Local 28, at their discretion in order

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* Seymour Zwerling, a Local 28 contractor, testified that at this time the State Commissioner for Human Rights was demanding that more non-whites be brought into the union and that

> "[The Contractors Association] suggested [to Local 28] that by going out and getting these blowpipe men, it was one of the suggestions, it would solve the demand of State Commissioner of Human Rights, and get rid of the problem." (462a.)

Obviously, this suggestion fell upon deaf ears.

> to meet the manpower of our employers recall pensioners who on doctors certificate are able to work in the industry and Local #28 will wave [sic] the disqualification provision penalty on Page 19. Sec. 11 (Quote) 'however in the event of an emergency in the Industry the Board of Trustees may suspend the 6 months disqualification provision.' (Unquote)." (Minutes dated July 20, 1967, 1033a.)*

This shortage of journeymen and apprentices became so critical, and Local 28's response so inadequate, that during *every year* from 1968 through 1972, the Contractors Association was forced to seek relief by initiating arbitration proceedings against Local 28 on this issue. (1238a-49a; 974a-92a; 1164a-89a; *see* 1125a-29a.) In each instance, Local 28 was required to increase the available manpower, which it sought to do by issuing hundreds of "identification slips" (i.e., permits) and by forcing an extraordinary amount of overtime work in the industry, thereby exacting an inordinate amount of overtime pay from the contractors. (Stipulation of Facts, ¶¶64, 105 and 107, 1077a, 1096a-99a; 215a-19a; 242a-47a; 1125a-29a; 1132a-41a; 435a; 479a; 483a-86a.) As demonstrated below, Local 28's response in this regard had both the purpose and the effect of excluding non-whites from employment opportunities in the sheet metal industry.

i. Permits and Over-time

Between 1968 and 1972 the number of permits issued by Local 28 rose from 150-200 to 400-500. (Stipulation of Facts, ¶64, 1077a.) By Local 28's admission, not one of these individuals was non-white."** (*Id;* Opinion, 96a-

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* This recommendation was adopted by the membership.

** At trial, Edward O'Reilly, Recording Secretary of Local 28, retracted this stipulation and revised Local 28's answers to the Government's interrogations by identifying one permit-holder as a non-white. (259a-64a.)

97a.) Local 28's explanation for this all-white work force was simply that it had never refused to issue a permit to anyone because of race. (259a.)

The record in this case belies that disclaimer. For instance, in the early fall of 1969 six black sheet metal workers from the Blowpipe Division of Local 400 * went to Local 28 for permits because, as stated by Henry Woods, "somebody found out that Local 28 was giving out permits to out-of-town guys to work. So we got together and decided we would go down and see if we could get a permit for work in Local 28." (640a.) Mell Farrell, President of Local 28, denied their requests and stated "that under any circumstances they will not give out permits and that the only way we could get in Local 28 was to take the journeyman's test." (*Id.*)

Woods further testified that he and the other black blowpipe workers informed Farrell that they had applied to take the upcoming exam and "wanted to know if we could also, until the test did begin, could we get a permit to work in Local 28 because we heard they were giving permits to out-of-town guys." (660a.) Again, Farrell refused and stated:

> " 'I want to make it crystal clear to you guys, we are not giving out permits but the only way you will be able to come into Local 28, you have to take the journeyman test, that was the only way.' " (*Id.*)

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* These men are the "group of apprentices and journeymen from Local 400" referred to in the District Court's opinion. (Opinion, 97a.)

** This testimony is fully corroborated by the testimony of Roosevelt Mitchell who immediately preceded Woods as a witness (572a-75a, 583a-84a.) It should be noted that at the request of counsel for Local 28, Woods had been sequestered during Mitchell's testimony. (552a-53a.)

As the permit statistics cited above demonstrate, the reason given by Farrell was simply untrue: There were hundreds of permit-holders in Local 28 at that time and the number was increasing. Included in this all-white group were "members of allied construction unions (i.e., plumbers, iron workers, lathers, carpenters, elevator erectors)." (Stipulation of Facts, ¶64, 1077a; Minutes, dated July 18, 1968, 1037a; 1129a; 1170a). Local 28 conceded that these men did *not* possess skills equal to those of journeymen sheet metal workers in Local 28, *nor* had they been required to take a test as a prerequisite to working in Local 28. (217a-18a; 268a.) Moreover, as the District Court found, although Local 28

> "saw fit to request [permit] men from sister locals all across the country, as well as from allied New York construction unions . . ."

it never once contacted the Blowpipe Division for manpower. (Opinion, 96a-97a.)

In sum, the evidence requires the conclusion that Local 28's refusal to issue permits to Woods and Mitchell and the other non-white blowpipe workers was based on its long-standing policy to exclude non-whites.*

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* All other proffered explanations defy both the facts and logic. When initially questioned at trial why Local 28 did not contact the Blowpipe Division in its quest for permit men, Edward O'Reilly explained "It was only building and construction locals that we contacted." (247a) After it was unquestionably established that the Blowpipe Division is a building trade local (352a; 377a-79a; 906-08a), O'Reilly simply changed his explanation: "We only sought men from locals that had heavy unemployment and to our knowledge that local [Blowpipe Division] had full employment, always looking for men, never short of manpower, and never had an unemployment problem to our knowledge." (802a.)

The District Court completely rejected this new explanation since the evidence was to the contrary:

[Footnote continued on following page]

Even with its large complement of white permitmen, the Local 28 work force was still unable to meet the manpower needs of the contractors during the period 1967 through 1972. Rather than recruit new members to meet these needs—a remedy advocated by the Contractors Association as well as the IA (1164a-73a)—Local 28 again chose to maintain the all-white *status quo* and argued for overtime as the way to solve the manpower problem. (435a; 480a; Minutes dated August 3, 1967, 1034a; 1140a; 1167a; 1181a; *see* Opinion, 97a.)

Local 28's insistent demand for overtime was quickly translated into reality. (Stipulation of Facts ¶105, 1096a-98a; 435a; 480a; 483a-85a.) For example, in 1971 the 40-plus member-firms of the Contractors Association had worked 767,991-3/4 hours of overtime.* (Stipulation of facts ¶105, 1097a.) Expressed in terms of its actual impact on job opportunities in the industry, the overtime worked by only these firms represents year-round full-time employment for approximately 439 additional sheet metal workers.** Previously, in 1970, 339,810 hours of overtime, representing full-time year-round employment for 194 additional men, were worked by the approximately 30 firms which reported such data. (Stipulation of Facts, ¶105, 1096a-98a; *see* 1168a.)

Besides depriving other sheet metal workers of substantial employment opportunities, this overtime created

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"Thomas Carlough, coordinator of the Local 400 apprentice program and himself a member of Local 28, testified that in 1970 the bankruptcy of a major blowpipe shop left many 400 sheetmetal workers without jobs." (Opinion n. 22, 119a; *see* 370a.)

* This figure does *not* include the number of overtime hours worked by the other 90 firms in signed agreement with Local 28 which are not members of the Contractors Association. (Data for these firms was not readily avilable.)

** Calculated by dividing 1750 (the number of hours in a work year) into 767,991-¾.

an extraordinary economic benefit for the virtually all-white Local 28 work force. The available data indicates that in January 1971 each member of the Local 28 work-force employed by members of firms of the Contractor Association were working approximately 13.96 hours of overtime per month.* By May, 1971, these members of the Local 28 workforce were averaging 21.26 overtime hours per month, and by September, 1971 that figure had risen to 25.84 overtime hours per month which, it must be remembered, was paid at *double* the regular wage rate. (1048a.)** Thus, by September 1971, the virtually all-white Local 28 workforce was earning an *additional* $500.00 per month in overtime pay.

ii. Transfers

During the period 1967 through 1972, Local 28 accepted 57 transfers*** from sister local unions, all of whom were white.**** (Opinion, 100a; 1231a-32a; Stipu-

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* This estimate is computed as follows: First, paragraphs 88 and 106 of the Stipulation of Facts, 1084a-85a, 1098a, set forth at certain monthly intervals the total number of journeymen and apprentices employed by Local 28 contractors within the New York City jurisdiction. Second, member-firms of the Contractors Association employ between 70% and 80% of the Local 28 work-force (*id.* ¶ 2, 1060a), and therefore, we can estimate that 75% of the monthly work-force set forth in paragraph 106 were employed by member-firms of the Contractors Association. Third, taking that estimate and dividing it into the monthly total of overtime hours worked by the Contractors Association (*id.*, ¶ 105, 1096a-98a), we can determine how many hours of overtime each individual worked per month.

** Compare *United States* v. *Enterprise Ass'n*, 360 F. Supp. 979, 986 (S.D.N.Y. 1973).

*** Transfers are authorized by Section 9(k) of Article 16 of the IA Constitution and Ritual. (915a.)

**** Local 28 has demonstrated a remarkable consistency in this regard: From May 24, 1940 through February 21, 1973 Local 28 accepted 153 transfers, all of whom were white. (Stipulation of Facts, ¶ 69, 1078a.) Pursuant to an agreement among the parties to this litigation, Local 28 accepted its first non-white transfers—two men from the Local 400 Blowpipe Division—in 1973. (Opinion, 100a.)

lation of Facts, ¶69,1078a.) As with permits, these statistics regarding transfers are "not the only evidence of Local 28's purposeful discrimination against non-whites." (Opinion, 100a.)

For example, Henry Woods testified that when he and the other black members of the Blowpipe Division of Local 400 met with Mell Farrell about permits*

> "we also asked if we could transfer into Local 28 because we said it was in the same International Association and why couldn't we transfer, which he said you are in a different local, which is a production local. The only way you can come into 28 is unless you take the test. That was it." (641a; *see* 653a-54a.)

As the District Court concluded, Farrell "indubitably knew that his statement was false" since he was well versed in the organization of the blowpipe industry. (*See* pp. 11-14, *supra.*) Moreover only nine months before Woods and the other black blowpipe workers requested transfers, Local 28 had accepted the transfers of four *white* members of the Blowpipe Division. (Opinion, 101a; 1236a.)

In addition, Local 28 has had a policy, first instituted around 1963, of accepting transfers of only former members of Local 28.** (Opinion, 101a; 199a; *see* 201a-02a; 325a; 1233a.) Since the membership of Local 28 was all-white prior to the time this policy was instituted, non-

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* *Supra,* pp. 16-17.

** O'Reilly conceded that this "former members only" policy was in violation of the IA policy embodied in Section 9(k) of Article 16 of the IA Constitution and Ritual. (200a.)

whites were automatically excluded from consideration for transfer.* (Opinion 101a-02a.)

In the face of this undisputed evidence of discriminatory acts and policies, the District Court concluded that the explanation offered by Local 28's officers—that they could not recall any non-whites who sought transfers and were rejected—was incredible. (Opinion, 101a-02a.)

iii. Organization of Non-Union Shops

Prior to 1973, 56 sheet metal workers became members of Local 28 through the organization of non-union shops. Not one of these individuals was non-white. (Stipulation of Facts, ¶82, 1081a.) As with every other instance where the record reflects such a statistical imbalance, the only explanation offered by the current Local 28 leadership is that they are not now, and never have been, aware of any sheetmetal shops owned by or employing non-whites, and that to their knewledge Local 28 never had a condition or restriction regarding race, color or national origin in connection with organizing shops. (203a-04a; 338a.)

As the District Court concluded, such an assertion by Local 28 "[tests] the credulity of the court" and is "clearly contradicted by the testimony of record." (Opinion, 98a.) First, *former* officials of Local 28 were aware of the existence of non-union sheetmetal shops employing non-white sheetmetal workers as early as the late 1940's. (885a-89a; 961a; 422a-23a.) Moreover, Edward Stack, President of Local 28 and a business agent from 1967 through 1974 (272a), acknowledged that he had received and responded to complaints that members of Local 295 of the Operating Engineers (Sheetmetal Workers)—of

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* It is absolutely indefensible for Local 28 to argue in its brief that because of unemployment in the *mid-1970's*, it limited transfers to "former members only" (Local 28's Brief, p. 8) since that policy was instituted in the *early 1960's*.

whom approximately 50% were non-white (1200a-10a)—were doing sheet metal work within Local 28 jurisdiction. (283a-85a.) Nonetheless, Stack later testified that he was unaware of any non-Local 28 shops that were owned by or which employed non-white sheet metal workers. (338a; 342a-43a.)

Second, there is unrebutted testimony by a black member of Local 295 that in late 1971, he lost his job with a sheetmetal firm when it was organized by Local 28. (759a-70a.) Rupert Jonas testified that while working for Integrity Sheetmetal * on a job in Cooperstown, New York, several men who identified themselves as members of Local 28 appeared at the job site and had the job stopped. (760a-61a, 771a-72a.) Thereafter, Jonas' supervisor from Integrity came to the site, conferred with the Local 28 men, and told Jonas and the other five men from Local 295 that "we are having a little problem here with Local 28 guys. I don't think we can finish it." (761a.) On the following morning, the men from Local 295 returned to New York City without finishing the job. (*Id.*)

Shortly after Jonas' initial encounter with Local 28, Integrity was organized by Local 28 (Opinion, 98a) and within several days Jonas and the other Local 295 men were fired. (763a, 769a-70a.) "One morning we came in and the boss told us that he is sorry, he tried to get us in 28 but they wouldn't go for it." (763a, *see* 774a-75a.) Nevertheless, several days later Jonas attempted to get an application at the Local 28 office and was refused one. (765a-66a.) Rather, he was told that Local 28 was "not

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* Jonas testified that there were approximately 13 members of Local 295 working at Integrity, eight of whom were black and two Spanish. (760a-61a.)

giving out any applications" and that "there was nothing else [he] could do." (773a.)*

Thus, despite every possible effort on his part, Jonas was denied an opportunity to work within Local 28's jurisdiction and earn the higher wages being paid in Local 28, *i.e.*, $9.80 per hour compared to $3.50 in Local 295 (766a-67a); at least temporarily, Local 28's purposeful actions prevented Jonas from earning *any* wages.

iv. Journeyman's Tests

Between 1959 and 1968, Local 28 had not administered a journeyman's exam. (156a-60a; 950a-53a.) In the fall of 1968, Theodore Kheel ordered Local 28 to administer a journeyman's exam to bring in 100 new journeymen and partially ease the "very serious" manpower shortage. (1245a-49a; 158a-59a.)

Although at least 15% of the 330 individuals taking the examination were non-white (163a-65a), not one of the 25 candidates who passed was non-white. (Stipulation of Facts, ¶ 67, 1078a.) The test had not been validated under EEOC guidelines (Stipulation of Facts, ¶ 68, 1078a) and apparently, could not have met the standard for job relatedness. Roosevelt Mitchell, a black sheetmetal worker who failed the exam but ultimately gained admission to Local 28, testified that "the test was —pretty far out. In other words, you had to have more or less a college degree to really do anything on that test." (585a; Opinion, 95a.) Moreover, because of the way in which the test was structured, Mitchell was never given an opportunity to demonstrate his practical competence

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* Jonas testified that this visit to Local 28 occurred in late 1971 (765a-66a), at a time when Local 28 had issued more than 400 permits to *white* out-of-towners and *white* members of allied trades and was working more than 70,000 man hours of overtime per month. (See pp. 15-19, *supra*.)

in sheetmetal. "[Y]ou couldn't get past the written test to get to the practical." (585a; *see* 159a, 166a.)*

A second journeyman's test was administered a year later, again on Kheel's order. (1238a-44a.) An analysis of its content and results puts into sharp focus the considerable obstacles that non-whites faced on the 1968 exam. Fourteen of the 75 successful candidates on the 1969 journeyman's exam were non-white. (Stipulation of Facts, ¶ 67, 1078a.) Included in this group were Mitchell and Floyd, both of whom had failed the 1968 exam, and Henry Woods who had not been permitted to take the prior exam. (572a-74a; 641a.)**

As with the 1968 examination, this test had not been validated under EEOC guidelines. (Stipulation of Facts, ¶ 68, 1078a.) Moreover, given the fact that Local 28 has no records regarding the number of non-whites who actually took the exam, it is impossible to judge whether the test was racially neutral or had an adverse impact on the non-white candidates. (Opinion, 95a.)

Nonetheless, there are several factors which may account for the presence, however small, of non-whites among the successful candidates. The 1969 exam was 20 questions shorter (167a-68a), a substantial portion of the alteration occurring in the mathematics section which was 8 questions shorter than the 1968 exam. (*Compare* 1287a-95a *with* 1308a-1314a.) The revised mathematics section had been restructured to test the candidates' knowledge of "shop math" and eliminate the more general and unrelated mathematical concepts used on the 1968 exam. (Opinion, 95a.)

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* Leroy Floyd, another black applicant who ultimately got into Local 28, was affected in the same way as Mitchell. (1299a.)

** Although Woods arrived 20 minutes late for the 1968 exam, it had not yet begun. Nonetheless, he was not permitted to take it. (642a-43a, 1307a.)

The evidence thus demonstrates that the success of non-whites in competing for membership positions in Local 28 rose as artificial and race-related obstacles were removed, however grudgingly,* from the Local 28 admission procedures. Nonetheless, Local 28 minimized such opportunities for non-whites—subsequent to the 1969 exam, and despite the continued severe shortage of men, Local 28 simply refused to conduct another journeyman's test. (Opinion, 96a.)

v. The Apprentice Program

The long history of purposeful discrimination by Local 28 against the admission of non-whites into the apprentice program has been detailed above. In addition, the evidence clearly demonstrated, and the District Court found, that the apprentice selection procedure instituted by Local 28 and JAC after the 1964 decision in *State Commission for Human Rights* v. *Farrell, supra*, has continued to exclude non-whites. (Opinion, 80a.)

Local 28's assertion that the apprentice program has averaged over 15% non-whites since 1968 is meaningless given that non-white participation has been declining. From 1967 to 1973, the percentage of non-whites in the apprentice program declined steadily from almost 22% to less than 10%. (Opinion, Finding #17, 76a.) It rose again to 13.99% when the District Court intervened in 1974 and ordered the appointment of 40 non-whites.

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* In this regard, Local 28 has offered no explanation for its decision to revise the 1968 exam before administering it in 1969. At least a partial explanation may, however, be found in the fact that after the results of the 1968 exam became known —all successful candidates were white—the New York State Commission for Human Rights served a subpoena on Local 28 regarding that test. (Minutes dated Dec. 2, 1968, 1042a.) Moreover Kheel had required Local 28 to consult with the employers concerning the content and administration of this exam. (1238a-44a.)

(Stipulation of Facts, ¶ 81, 1080a-81a; 30a-32a; 47a-49a.) Since January 1970, when a high school diploma became, for the first time, an absolute requirement for admission, a total of 446 persons have been admitted to the apprentice program without judicial intervention. Less than 10% (43) of these individuals have been non-white. (Stipulation of Facts, ¶ 29, 1069a-70a.)*

The reason for the declining participation of non-whites in the apprentice program was made clear by the testimony at trial. Based upon the testimony of Dr. Raymond Katzell, Professor of Psychology at New York University and an expert in industrial psychology and psychological testing, the District Court concluded that each of the eight apprentice entrance exams administered between 1968 and 1973 had an "adverse impact" on non-whites by disqualifying non-whites at a higher rate than whites, and that the impact was not likely to have occurred by chance. (Opinion, 80a-81a.)**

In response, Local 28 and JAC presented *three* supposed validation "studies" in an attempt to justify use of these tests on the grounds that they were job related. This proof was an utter failure. The District Court concluded that the first study—an "indirect validation study" —had "little, if any, probative force." (Opinion, 84a.) As to the second study, involving "predictive validity", the District Court found that it presented "little evidence of validity" and indeed, that it largely supported Dr. Katzell's testimony that the exam "adversely affects non-

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* Notwithstanding that by contract, apprentice classes are to be appointed every six months and the size of the program is to be stabilized at 568 apprentices (1050a; Stipulation of Facts, ¶ 30, 1070a), the program has fallen sharply to half the required size and classes have been indentured only under court order. (Stipulation of Facts, ¶¶ 29 & 81, 1069a-70a, 1080a-81a.)

** Dr. Katzell's testimony showed that the odds of this adverse impact occurring by chance were less than 1 in 100. (309a.)

white applicants." (Opinion, 85a.) Local 28's and JAC's third study, another "predictive validity" study, was characterized as "seriously incomplete" by the District Court. (Opinion, 86a.) In short, the District Court was compelled to find that since the evidence of job-relatedness was "spotty and largely equivocal" (Opinion, 87a), JAC and Local 28 had failed to carry their burden on this issue. (Opinion, Conclusion # 5,103a.)

In addition, commenting that it was unclear why a high school diploma had been added as a requirement for admission to the apprentice program, the District Court concluded that this requirement also had an adverse impact on non-whites and was therefore prohibited by Title VII. (Opinion, 88a.) The testimony established that the mathematics used in the apprentice program is taught in public school grades four through nine (228a-35a), and therefore, no nexus had been established between the knowledge needed for success as an apprentice and a high school diploma. (Opinion, 89a.) Since the evidence further demonstrated that non-whites obtain high school diplomas at a lower rate than whites (995a-1000a), the Distirct Court concluded that this aspect of the apprentice admission procedure was also discriminatory and therefore impermissible under Title VII. (Opinion, 89a-90a.)

vi. Interference With Affirmative Action Requirements

Another aspect of Local 28's discriminatory practices against non-whites has been its unrelenting interference with the efforts of its contractors to implement an affirmative action program under Executive Order 11246, 3 C.F.R. Chapter IV § 202, and Mayoral Executive Order 71, 96 The City Record 2342 (April 10, 1968), as well as its uncompromising refusal to participate in the New York Plan or a separately negotiated affirmative action program. (Opinion, Findings ##6 and 11, 73a and 75a.)

Under Executive Order 11246 and Mayoral Executive Order 71, contractors receiving federal or city construction funds were required to undertake such affirmative action, including goals for the employment of non-whites, as would guarantee equal employment opportunities for non-whites. (Opinion, Finding #6, 73a.) Under both orders, affirmative action commitments were applicable to all of a contractor's construction projects (both public and private) during performance of the public contract. (41 C.F.R. § 60-1; Mayoral Executive Order 71, § 4.)

Since Local 28 was, and is, the sole source of sheetmetal workers for the Local 28 contractors (pp. 4-5 *supra*), the union's cooperation in participating in an affirmative action program was imperative to securing compliance by the contractors with Executive Order 11246 and Mayoral Executive Order 71. (529a; *see* Opinion, Finding # 6, 73a.) However from the beginning, Local 28 made it clear that it would not cooperate: When the contractors proposed to Local 28 the creation of a "Non-Discriminatory Hiring Committee" the union simply refused. (1130a-35a; *see* 248a-54a; 336a-37a; 430a.)

As new proposals were made concerning non-white recruitment and training, Local 28's position never changed. In 1968-69, the City started a pilot program with the Building Trades Council, of which Local 28 is a member (332a-34a), by which contractors were required to recruit and employ non-white construction workers, known as "trainees" in a ratio of one trainee to four journeymen. (685a-88a.) Local 28 again refused to participate and, as stated by James McNamara, the City's Program Director, no sheetmetal trainees were placed through this program. (687a-88a.)

In 1970, this pilot program was extended city-wide by Executive Order 20 and the adoption of a limited industry-sponsored voluntary plan, known as the New York

Plan. (688a-91a.)* Again, Local 28 refused to participate (Stipulation of Facts, ¶ 80, 1080a; 530a-32a), and indeed, Local 28 was the *only* skilled trade that did not participate in the New York Plan, or some related program worked out between the union and the City. (692a-96a; 730a-33a.)

Local 28's reason for refusing to participate—that it was already recruiting enough non-whites and that its apprentice program was the *only* satisfactory method of bringing in non-whites**—was obviously untrue. At that time, non-white participation in the Local 28 apprentice program was *declining* and it has since continued to decline. (Stipulation of Facts, ¶¶ 29 and 51, 1069a-70a, 1073a.) Likewise, the operation of its apprentice program had resulted in less than 2% non-white membership in Local 28. (*Id.* ¶ 60, 1075a-76a.)***

The City was willing to negotiate a tailor-made alternative to the New York Plan to meet the specific needs of Local 28 and had done so with several other unions. (693a-95a.) Likewise, it was suggested to Local 28 that trainees be integrated into the regular apprentice program; although this suggestion was acceptable to the contractors, Local 28 again said no.**** (545a-46a.)

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* The New York Plan was agreed to by the City, The State of New York, the Building and Construction Trades Council and the Board of Urban Affairs. (*Id.*) In addition, it was approved by the U.S. Department of Labor, Office of Federal Contract Compliance, as satisfying the requirement of Ex. Order 11246 (Federal Bid Conditions Part I.)

** 734a-42a; 339a-40a; 782-83a, 789a.

*** Included in those figures are the 14 non-whites who passed the 1969 journeyman's test.

**** Local 28 also rejected the suggestion that it accept transfers by non-whites from Local 400. (682, 727a.)

Local 28's position regarding affirmative action hardened even further in early 1974. At that time, several public job sites were closed down by community protests stemming from the absence of non-white sheetmetal workers on these job sites. After negotiations with the City and Local 28 (709a-10a), the contractors agreed to take on non-white trainees. When the trainees arrived at the job sites, they were not, however, permitted to work because "the Local 28 men either refused to return to the job or they walked off the jobs in protest of minority trainees." (711a.)

After further negotiations between the City and Local 28, the Executive Board and membership of Local 28 ultimately rejected the City's proposal that the trainees be permitted to work on these job sites.* (712a-26a; 784a-87a; 1216a.) Only after the matter was brought before the District Court, and several interim orders were entered in this action, did Local 28 finally relent and accept some non-white trainees on several public construction sites. (*See* Record herein, P. Exh. 60.)

C. The Relief Granted by the District Court

Seeking to fashion relief which would adequately remedy this multifaceted and clear pattern of discrimination by Local 28 and JAC against non-whites, the District Court viewed a relevant consideration to be whether Local 28 and JAC have "voluntarily 'cleaned house' or taken any meaningful steps to eradicate the effects of [their] past discrimination." (Opinion, 104a, citing *Rios* v. *Enterprise Association, etc.*, 501 F.2d 622, 631-32 (2d Cir. 1974).) Cataloguing but a few examples of "bad faith attempts to prevent or delay affirmative action" (Opinion, 104a) the District Court concluded that

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* In addition, Local 28 instituted an NLRB proceeding against the contractors for hiring trainees. (714a-15a.) At the same time, the Contractors Association applied to the District Court for an injunction against Local 28's interference with the performance of work at these sites. (47a-48a.)

> "the imposition of a remedial goal in conjunction with an admission preference in favor of non-whites is essential to place the defendants in a position of compliance with the 1964 Civil Rights Act." (*Id.*, 105a.)

Indeed, the purpose of this relief was "to place eligible non-whites in the position they would have enjoyed had there been no discrimination." (*Id.*)

Based upon a detailed statistical analysis of the relevant available work force (*id.*, 106a-07a, 122a-24a), and considering the "depressed economic condition of the construction industry" (*id.*, n. 30, 120a), the District Court directed that Local 28 and JAC achieve a goal of 29% non-white membership in the union and the apprentice program by 1981.* As part of a program to insure that this goal is achieved, the District Court provided, *inter alia*, for the appointment of an administrator and also required Local 28 to appoint a non-white as a trustee of JAC. (*Id.*, 107a-08a.)

Although concluding that backpay is both necessary and proper in this case, the District Court sharply limited eligibility for such awards by holding that only the claims of non-whites for whom there exist records of application for direct entry into the union, either through a journeyman's exam or transfer from an affiliated sister local union, would be considered. (*Id.*, 108a-11a.)** Since

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* The arguments raised in Local 28's brief attack neither the magnitude of the goal nor the schedule for its achievement.

** Specifically excluded from consideration under the District Court's eligibility standards are (a) non-whites denied entrance to the apprentice program (b) the non-white blowpipe workers organized as part of Local 400 rather than as part of Local 28 and (c) non-whites who were discouraged from applying for admission because of Local 28's and JAC's reputation. (*Id.* 110a.) By implication, the following categories of non-whites were also excluded: non-whites who were denied permits, and non-whites who were denied admission when a non-union shop was organized.

Local 28 and JAC have not maintained records of applications, the District Court acknowledged that this "records" requirement for back pay eligibility was "in effect rewarding [Local 28 and JAC] for their failure to keep adequate records as required by EEOC Guidelines." (Opinion, 109a.) Nonetheless, a different standard, the District Court asserted, would render an award of back-pay "hypothetical." (*Id.*, 110a.)

ARGUMENT

POINT I

The imposition of a non-white membership goal, supported by statistics and implemented by an administrator, is necessary and proper to remedy the scourge of discrimination in Local 28.

As this Court has affirmed time and again:

> "The objective of Title VII is to 'attack the scourge of racial discrimination' which has 'caused manifold economic injuries, including drastically higher rates of unemployment and privation among racial minority groups.' *United States* v. *Wood, Wire & Metal Lathers Intl. Union*, 341 F. Supp. 694, 699 (S.D.N.Y. 1972) *aff'd.*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973)." *Patterson* v. *Newspaper & Mail Deliverers' Union of New York and Vicinity*, 514 F.2d 767, 772-73 (2d Cir. 1974) *petition for cert. filed sub nom. Larkin* v. *Patterson*, 44 U.S.L.W. 3069 (July 28, 1975).

Under this statutory mandate, a district court " 'has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the

future." *United States* v. *Wood, Wire & Metal Lathers International Union*, 471 F.2d 408, 413 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973) *quoting from Louisiana* v. *United States*, 380 U.S. 134, 154 (1965).

Indeed, this Court has explicitly held that

> "this delegation of broad equitable power [authorizes] the district court to establish goals for the purpose of remedying the effects of past discriminatory conduct." *Rios* v. *Enterprise Association, etc., supra*, 501 F.2d at 629; *see Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420, 427-28 (2d Cir. 1975) *petition for rehearing pending.*

Moreover, this view is shared by every other Circuit which has considered the issue.* *See, e.g.*, cases cited in *Rios* v. *Enterprise Association, etc., supra*, 501 F.2d at 629, and *Boston Chapter, NAACP* v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 95 S.Ct. 1561 (1975); *Erie Human Relations Comm'n* v. *Tullio*, 493 F.2d 371

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*In a related context involving the use of racial goals to remedy unlawful segregation in a public school system, the Supreme Court has stated:

> "As we have held in *Swann* [V. *Charlotte-Mecklenberg*, 402 U.S. 1, 25 (1971)], the Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping of a remedy. An absolute prohibition against use of such a device—even as a starting point—contravenes the implicit command of *Green* v. *County School Board*, 391 U.S. 430 (1968), that all reasonable methods be available to formulate an effective remedy." *North Carolina State Board of Educ.* V. *Swann*, 402 U.S. 43, 46 (1971).

Cf. Miliken v. *Brady*, 418 U.S. 717, 744-45 (1974).

(3d Cir. 1974); *United States* v. *T.I.M.E.-D.C., Inc.*, 517 F.2d 299, 320 (5th Cir. 1975); *United States* v. *Masonry Contractors Ass'n of Memphis, Inc.*, 497 F.2d 871 (6th Cir. 1974); *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975); *Carter* v. *Gallagher*, 452 F.2d 315, 327 (8th Cir.) (en banc), *cert. denied*, 406 U.S. 950 (1972); *Southern Illinois Builders Ass'n* v. *Ogilvie*, 471 F.2d 680 (7th Cir. 1972).

Given the mandate of Title VII and the historical and continuing pattern of discriminatory practices by Local 28 and JAC, the District Court's order requiring a non-white membership goal with an admission preference and appointment of an administrator, is a proper, and indeed, judicious exercise of the District Court's equitable powers. On a record strikingly similar to the one herein, this Court in *Rios* explicitly sanctioned such relief:

> "[The] undisputed facts justified the district court's grant of more drastic relief than a mere prohibition against future discriminatory conduct on the Union's part. The court's findings, which are not controverted, disclose a pattern of long-continued and egregious racial discrimination which permeated the steamfitting industry, precluding qualified non-white applicants from gaining membership in the Union's A Branch and maintaining it as a 'white' union. The Union has failed completely to demonstrate that its discriminatory practices could be justified on legitimate grounds such as safety considerations or the high level of skill required of Union members. Nor has the Union, despite the opportunity afforded after the issuance of preliminary relief, voluntarily 'cleaned house' or taken any meaningful steps to eradicate the effects of its past discrimination. Under the circumstances the imposition of remedial goals was not an abuse of discretion." *Rios* v. *Enterprise Association, etc., supra*, 501 F.2d at 631-32.

Local 28's attempt to distinguish *Rios* on the ground that there is no evidence or finding of intentional or long-standing discrimination in this case (Local 28's Brief, pp. 16-17) is ill-founded. Initially, Local 28 has misconceived the standard for determining whether a remedial goal is appropriate. Clearly, this Court did not articulate a standard in *Rios* of "intentional discrimination" as a prerequisite to the use of remedial racial goals. *Rios* v. *Enterprise Association, etc., supra,* 501 F.2d at 628-33. The only standard that has ever been prescribed by this Court is whether the goal is necessary for "the eradication of past discrimination." *Id.* at 633; *United States* v. *Wood, Wire & Metal Lathers Int'l. Union, supra,* 471 F.2d at 413-14. *See also Kirkland* v. *New York State Department of Correctional Services, supra,* 520 F.2d at 427-28. And it has repeatedly been held that regardless of intent or bad faith, facially neutral practices which have a racially disproportionate effect are sufficient to establish a violation of Title VII and justify broad equitable relief. *See e.g., Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971); *Patterson, supra; Rios, supra.*

Given the District Court's detailed findings of long standing discrimination and its carefully reasoned conclusion that a remedial goal is "*essential*" to bring Local 28 and JAC into compliance with Title VII (Opinion, 104a-05a), there can be no doubt that the District Court's action was a proper exercise of discretion.* Indeed, it may

* Local 28's further argument that a remedial goal is improper here, in contrast to *Rios,* because there is no "readily identifiable" group of non-whites who should be afforded their "rightful place" is incomprehensible. To the contrary, the District Court, adhering to guidelines set down by this Court in *Rios,* concluded that 29% of the relevant labor force in New York City consists of eligible non-whites. (Opinion, 105a-07a.) Moreover, the plaintiffs called a number of non-whites as witnesses who testified concerning their continuing attempts to gain admission to Local 28 (*e.g.,* 668a-75a, 751a-75a, 845a-50a, 858a-65a), and also presented other evidence of the substantial number of non-whites available for membership in Local 28. (851a-56a, 1328a-30a.)

well have been an abuse of discretion not to order such relief in these circumstances. *See Morrow* v. *Crisler*, 491 F.2d 1053 (5th Cir.) (*en banc*), *cert. denied*, 419 U.S. 895 (1974); *Reed* v. *Arlington Hotel Co.*, 476 F.2d 721 (8th Cir.), *cert. denied*, 414 U.S. 854 (1973).

Regardless, intent to discriminate has been shown time and again in this record. Indeed, only by ignoring the evidence can Local 28 assert in its brief that "intentional discrimination is not present" here. (p. 17.) Similarly, Local 28's statements that the District Court did *not* find intentional discrimination (*id.* pp. 8-11) are the product of its out-of-context quotations from the District Court's opinion, its distortion of the plain meaning of these quotes * and its complete disregard for *explicit* findings of purposeful discrimination. (*E.g.* Opinion, 93a-94a, 97a-98a, 100a-01a, 104a-05a.)**

Local 28 has additionally argued that the remedial racial goal ordered here is improper under this Court's recent decision in *Kirkland* v. *New York State Department of Correctional Services, supra.* This argument also fails since the facts in *Kirkland* and the Court's analysis therein are readily distinguishable from this case.***

As articulated by the Court, the issue presented in *Kirkland* was whether evidence of racial discrimination in the results of one civil service promotion examination justified the District Court's order providing for promo-

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* *Compare* the quotes at p. 9 of Local 28's Brief *with* the Opinion, 96a-97a, 99a, 100a-01a.

** It bears repeating that by this appeal, Local 28 does not challenge the factual findings made by the District Court. (*See* Local 28's Brief, p. 2.)

*** In addition, it should be noted that the EEOC has filed a brief as *amicus curiae* on the petition for a rehearing in *Kirkland* urging reversal of that decision.

tion by racial quota in addition to the establishment of new civil service testing procedures. 520 F.2d at 427-28. On this issue, the Court held:

> "In view of the limited scope of the issues framed in this class action and the paucity of proof concerning past discrimination, we feel that the imposition of permanent quotas to eradicate the effects of past discriminatory practices is unwarranted." *Id.* at 428 (Footnote omitted.)

Further, the absence in *Kirkland* of "a clear-cut pattern of long-continued and egregious racial discrimination" coupled with the presence of "identifiable reverse discrimination", in the Court's view, distinguished that case from *Pios* and the other cases in this Circuit. (*Id.* at 427.)

The present case suffers from no such deficiencies; *Kirkland* therefore is clearly inapplicable. As the District Court concluded, the allegations of a broad pattern and practice of discrimination against non-whites by Local 28 and JAC "have been largely substantiated by the evidence produced at trial." (Opinion, 70a-71a.) Specifically, the District Court found that Local 28 and JAC had engaged in discriminatory practices in the recruitment, selection, training, and admission of non-whites into both the Union and its apprentice program *prior to 1965 and continuing to the present.* (Opinion, Conclusions ## 3-6, 102a-03a.)

Moreover, the District Court commented that the record is "replete with instances of . . . bad faith attempts to prevent or delay affirmative action" and that Local 28 and JAC have continually failed to voluntarily "clean house." It thus correctly reasoned that the remedial racial goal with a preference for non-whites was *essential* to "place eligible non-whites in the position they would have enjoyed had there been no discrimination." (*Id.*, 105a.)

Similarly, Local 28's attempt to characterize the relief here as a form of "reverse discrimination" as discussed in *Kirkland* or "bumping" referred to in *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971), must fail. The remedial racial goal and preference ordered in this case, unlike the situation in *Kirkland*, operates only to bring eligible non-whites into the union and its apprentice program. Such entry level goals and preferences, which were not at issue in *Kirkland*, have repeatedly been sanctioned by this Court. *Rios* v. *Enterprise Association, etc. supra; Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Comm'n*, 482 F.2d 1333 (2d Cir. 1973); *United States* v. *Bethlehem Steel Corp., supra; See Patterson* v. *Newspaper & Mail Deliverers' Union for New York and Vicinity, supra*, 514 F.2d at 773. ("A reasonable preference in favor of minority persons in order to remedy past discriminatory injustices is permissible.")

Moreover, since membership in the union is not a guarantee of employment (332a) and Local 28 does not maintain a hiring hall (Opinion, 74a), non-whites admitted under this goal and preference will be subject to the same informal, word-of-mouth referral and hiring practices that the white membership of Local 28 presently faces. Thus, unlike the situation in *Kirkland*, no one will even "be 'bumped' from a preferred position on [an] eligibility list because of his race." 520 F.2d at 429 (Footnote omitted). *See Patterson* v. *Newspaper & Mail Deliverers' Union for New York and Vicinity, supra*, 514 F.2d at 774.

Judge Gurfein, while a District Judge, drew this precise distinction in ordering a remedial racial goal in another union discrimination case:

> "The case of admission to membership in a labor union is, however, a step removed from the civil service list in a municipality. Here there is

> no state law, as there is in civil service, mandating the order of appointment from a list based on relative qualification by examination. Nor is membership in a union equivalent to actual appointment or employment. It is a step to employment and, while in the long run an increase in membership may mean less jobs for whites as a group, it does not penalize a particular white who has a priority status for a particular vacancy. It is, therefore, easier, in a union membership case, to adopt a ratio of minority to non-minority increase in membership until a relative balance is achieved." *United States* v. *Local 40*, 347 F. Supp. 169, 182 (S.D.N.Y. 1972).*

Other courts share this view:

> "It is of course evident that when the blacks are allowed to qualify, they will be able to move into any regular job which becomes vacant due to death, illness, promotion, and the like. . . . This will inevitably negatively affect some whites currently working as conductors. As we have noted elsewhere, the affirmative remedial relief required by the Act 'often proves detrimental to whites' competitive seniority status, and consequently.' *United States* v. *Jacksonville Terminal Co.*, [451 F.2d 418, 455]. This regrettable detriment to the pool of extra white conductors is not to be equated with bumping whites from regular jobs." *Gamble* v. *Birmingham Southern RR Co.*, 514 F.2d 678, 685 (5th Cir. 1975).

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* Even in the civil service context, this Court has sanctioned the use of remedial goals. *Vulcan Society of the New York Fire Dep't* v. *Civil Serv. Comm'n*, 490 F.2d 387 (2d Cir. 1973); *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Serv. Comm'n, supra.*

Further, this Court in *United States* v. *Bethlehem Steel Corp., supra*, has reasoned:

> "Assuming *arguendo* that the expectations of some employees will not be met, their hopes arise from an illegal system. . . . If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed. *Cf. Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968)." 446 F.2d at 663.

In the final analysis, Local 28's attack on the remedial racial goal and preference ordered by the District Court, and its related plea of unemployment (Local 28's Brief, pp. 16-17), represents the same "unhappiness" referred to and rejected by this Court in *Bethlehem Steel Corp.* So too, should that plea be rejected here.*

POINT II

The Order requiring Local 28 to appoint a non-white JAC trustee is necessary and proper.

Local 28's challenge to the District Court's order directing the union to appoint a non-white as one of its three representatives on the JAC is without merit.

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* *See United States* v. *Wood Wire & Metal Lathers Int'l. Union*, 341 F. Supp. 694, 699 (S.D.N.Y. 1971), *aff'd*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973). ("[T]he remedies Congress ordered are not required to be utterly painless. . . . It is not startling, then, though it may be morose and grudging, to hear the union repine that the remedy for such evils may seem like an order 'to let new men share in the unemployment.' Perhaps it might be more positive to say that the objective is to allow those on the outside to enter and share in the *employment*." (Emphasis in the original.))

Viewed against the sorry history of JAC's discrimination, the District Court's order is clearly appropriate and necessary to ensure compliance with the mandate of Title VII.

The District Court specifically found that JAC has engaged in a long and continuing pattern of discrimination against the admission of non-whites. (Opinion, Conclusions ##4-6, 103a.) Instances of this unlawful conduct include relying on nepotism as the basic criterion for admission to the apprentice program (*id.*, 79a), instituting selection procedures which discriminate against non-whites and are not job-related (*id.*, 80a-90a), improperly obtaining an exemption from state affirmative action requirements (*id.*, 104a-05a) and, most recently, "unilaterally [suspending] court-ordered time tables for admission of forty non-whites." (*Id.*, 105a.)* Since the JAC trustees administer the apprentice program (Stipulation of Facts, ¶¶3 & 24, 1061a, 1067a), Local 28's attempt to absolve the trustees of responsibility for this discriminatory conduct fails. Leaving aside any question of intent, the fact is that, historically, the administration of the apprentice program by the JAC trustees has resulted in a pattern and practice of discrimination against non-whites. A non-white has never been a trustee of the JAC. (Opinion, Finding #15, 75a.)

Under the mandate of Title VII which vests courts "with broad power to grant affirmative relief to combat invidious and often subtle practices of discrimination" *United States* v. *Wood, Wire & Metal Lathers Int'l. Union*, *supra*, 471 F.2d at 413 (footnote omitted), the District Court's action requiring Local 28 to designate a non-white

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* JAC also permitted Local 28 to use its facilities, without charge, to conduct training sessions for Local 28's "boys" in preparation for apprenticeship entrance exams ordered by the Court in *State Commission for Human Rights* v. *Farrell*, *supra*. (192a.)

trustee was a proper exercise of its discretion. The Order and Judgment here prescribes that a non-white shall serve as a union-designated trustee *only* during the time that Local 28 and JAC are implementing the court-ordered program of affirmative action. (Order and Judgment, ¶ 21(d), 139a.) Given JAC's participation with Local 28 in "flaunting" the earlier State Court mandate and its role more recently in unilaterally suspending the directives of a new court order, the District Court had strong reason to doubt the ability of the present JAC trustees, on their own, to fully and conscientiously implement the broad affirmative relief found necessary and ordered in this case.

Local 28's further argument that the present trustees of JAC have a "vested, substantial right" to retain their positions as trustees is unfounded. Edward Stack, president of Local 28, testified at trial that the union-designated trustees are appointed by the president and do not have fixed terms of service. Indeed, Stack conceded that they serve at the pleasure of the president. (1227a-28a.) Such an appointment procedure hardly results in a "vested, substantial right" to serve as a trustee.

Moreover, in a related context, this Court has sanctioned a prophylactic measure similar to the one taken by the District Court. In *Rios* v. *Enterprise Association, etc., supra*, the District Court ordered the establishment of an examining board, consisting of the Administrator (or his representative), a representative of the union, and an individual chosen by the Administrator from a minority referral source, to supervise and administer practical examinations for direct admission to the union. 501 F.2d at 626.* Prior to this time, a committee composed of

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* This examining board is now part of the permanent relief ordered in that action. *See* Order dated March 29, 1974 in *Rios* v. *Enterprise Association, etc.*, 71 Civ. 847, 71 Civ. 2377 (S.D.N.Y.).

three union officers had sole responsibility for deciding whether an individual was eligible for direct admission to the union. *United States* v. *Enterprise Association, etc.*, 360 F. Supp. 979, 985 (S.D.N.Y. 1973). On appeal, the union challenged the right of the District Court to replace its committee of three union officers with the examining board. Rejecting that challenge, this Court simply stated:

> "In view of the Union's history of discrimination the establishment of a Board of Examiners was appropriate." *Rios* v. *Enterprise Association, etc., supra*, 501 F.2d at 634. *See United States* v. *Local 40*, 347 F. Supp. 169 (S.D.N.Y. 1972) (Gurfein, D.J.)

Given JAC's history of discrimination in this case, the District Court's provision for a non-white trustee is entirely appropriate; it is certainly within the bounds of the broad discretion that a District Court has in a Title VII. *Louisiana* v. *United States, supra; Rios* v. *Enterprise Association, etc., supra*, 501 F.2d at 631. Indeed, such action may finally help to fulfill the hope, first expressed by the State Court in 1964, that Local 28 become a "truly non-discriminating union."

POINT III

The standards set by the District Court for the award of backpay are improper and should be reversed.

In *Albemarle Paper Co.* v. *Moody*, U.S. 95 S. Ct. 2362 (1975), the Supreme Court has recently reaffirmed the fundamental role played by backpay awards in the "legislative design" of Title VII which is "directed at an historic evil of national proportions." 95 S. Ct at 2371.

The Supreme Court instructed that

> "[Given] a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 95 S. Ct. at 2373 (Footnote omitted).

The District Court's decision denying backpay to all but a very limited class of non-whites in this case fails to meet the standard set in *Albemarle*, and indeed, if it is permitted to stand, or if it is applied more generally, will seriously frustrate "the central statutory purposes" of Title VII.

Despite broad findings of discrimination, the District Court here limited its award of backpay to only those victims of discrimination for whom there exist records of application for direct entry into the union. (Opinion, 110a.) The District Court excluded from eligibility, either explicitly or by implication, several classes of non-whites whom it had previously found were the victims of Local 28's and JAC's discrimination. (*Infra*, p. 47.)

The rationale for this wholesale elimination from eligibility was cryptically and inadequately explained by the District Court. "Any award of damages to those for whom records do not exist would at best be hypothetical." (*Id.* 110a.) In the case of apprentices (for whom records *do* exist), blowpipe workers and those affected by Local 28's and JAC's reputations, the damages themselves would be "speculative" or "unascertainable." (*Id.*) A final rationale for limiting eligibility to this "undoubtedly small"

class was that there would be no risk of "inequitably" draining the union's financial resources. (*Id.*)*

The District Court's action, and its stated reasons, conflict with the standards of *Albemarle*. By requiring a "record" of direct admission, thereby sharply limiting the class of eligible non-whites, the District Court by its own admission, is "in effect rewarding" Local 28 and JAC for failing "to keep adequate records as required by the EEOC Guidelines". (Opinion, 109a.) Such a reward in this case surely "frustrates" the "central statutory purposes" of Title VII.

The EEOC also strongly disagrees that "the alternative" is "clearly unacceptable" since it would allegedly result in hypothetical damages.** (*Id.*, 110a.) Surely, the chance existence of a written record cannot be dispositive of whether an injury has, in fact, occurred. If injury has been suffered, the lack of a record cannot somehow render such injury "hypothetical", nor should it automatically deny affected non-whites their statutory right to be made whole.***

Moreover, it is submitted that the alternative—testimony by non-whites who have experienced the

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* Since the District Court limited the class of eligible non-whites to those seeking direct admission, over which the JAC has no control, it held that only Local 28 would be liable for backpay damages. (*Id.*, n. 32, 121a.)

** Certainly, by this comment, the District Court has failed to "carefully articulate its reasons" for denying backpay as required by *Albemarle*, 95 S. Ct. at 2373, n. 14.

*** In *Hairston* v. *McLean Trucking Co.*, 520 F.2d 226 (4th Cir. 1975), the Court considered whether a non-white should automatically be denied backpay in a Title VII case if he had not actually requested a transfer or promotion to a higher paying position. Although the lack of such a request was "relevant", the Court noted that "clearly, it is not dispositive." 520 F.2d at 231.

manifold variants of Local 28's and JAC's discrimination —is *completely* acceptable. Testimonial evidence, whether or not corroborated by documentary evidence, is an integral part of all litigation. Indeed, it was *crucial* in proving the underlying case of discrimination which is the predicate for both the injunctive and equitable relief ordered by the District Court. There is no reason why it should be excluded in backpay proceedings. By doing so, the District Court has in effect adopted different standards for granting injunctive and backpay relief in a Title VII case. The Supreme Court in *Albemarle* explicitly rejected such a double standard:

> "There is nothing on the face of the statute or in its legislative history that justifies the creation of drastic and categorical distinctions between those two remedies." 95 S. Ct. at 2374 (Footnote omitted.)

It is respectfully submitted that the District Court's double standard here was an abuse of discretion.

Further, by its decision, the District Court has automatically excluded several other classes of non-whites which it found had been discriminatorily refused access to the union (*i.e.* permitmen, Opinion, 96a-97a; non-whites not admitted when non-union shops were organized, *id.*, 94a; blowpipe workers *id.*, 98a-99a) as well as to the apprentice program (*id.*, 79a-90a). Likewise, non-whites who may have failed to apply for admission because of what the District Court characterized as Local 28's and JAC's "well-deserved reputation in non-white communities of discriminating in recruitment, selection, training and admission" have also been excluded. (*Id.*, 102a-103a.)

Given these findings of discrimination and the attendant effect on non-whites, the District Court's conclusion that damages from these forms of discrimination

are "too highly speculative" or "unascertainable" to even permit members of the affected classes to present specific evidence of individual discrimination is erroneous. The existing record already contains some of the evidence of specific damages to individuals, such as those who failed apprentice entrance exams (see discussion, *supra*); backpay hearings would naturally supplement this record.

In *United States* v. *United States Steel Corp.*, No. 73-3907 (5th Cir., Oct. 8, 1975), the Fifth Circuit reversed a decision of the District Court which, after finding a pattern and practice of discrimination, did not afford certain classes of non-whites an opportunity "one-by-one, to present personal claims for backpay." (*Id.*, Slip Opinion, p. 90). In remanding the case to the District Court, the Fifth Circuit gave explicit instructions that the members of the class of non-whites against whom the defendants had discriminated were "presumptively entitled" to an opportunity to prove individual damages. Noting that a "bifurcated approach" is proper in a Title VII case, the District Court directed that in "Stage I" the plaintiffs "must demonstrate a *prima facie* case of employment discrimination." Once this case is established then the class of non-whites is "presumptively entitled to move into Stage II with the presentation of individual backpay claims." Slip Opinion, p. 91. *Accord*, *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th 1974).

It cannot be doubted that in this case the plaintiffs have already demonstrated much more than a "*prima facie*" case of violations of Title VII with respect to (a) the apprentice program admission procedures, (b) Local 28's use of permits, (c) its refusal to organize non-whites, including the blowpipe workers, and (d) Local 28's and JAC's pervasive reputation for exclusion of non-whites. The District Court has nonetheless prohibited affected non-whites from moving into "Stage II". Clearly that

action by the District Court frustrates a "central statutory purpose" of Title VII and must therefore be reversed. *Albemarle Paper Co.* v. *Moody, supra; United States* v. *United States Steel Corp., supra.*

The District Court's further rationale that the alleged "speculative" or "unascertainable" degree of damages should eliminate from back pay eligibility whole classes of non-whites has been soundly rejected by the Fourth Circuit's decision in *Hairston* v. *McLean Trucking Co., supra*:

> "[We] reject the notion that an employer who has practiced racial discrimination in employment may avoid redressing the wrong inflicted on the ground that the resulting injury is not capable of precise measurement. . . . Title VII condemns subtle as well as gross discrimination, and our duty to redress all forms of discrimination is clear. Like a jury's determination of compensation for pain and suffering in a suit for personal injuries, 'unrealistic exactitude is not required' in back pay determinations; and because of the nature of the case, 'uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating employer.' *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1380, n. 53 (5 Cir. 1974). See also *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.d 211, 260-61 (5 Cir. 1974)." 520 F.2d at 232-33.

By its decision here, the District Court is in effect requiring non-whites to show damages with "unrealistic exactitude" and is *automatically* resolving "uncertainties" as to damages *against* those non-whites who have expe-

rienced the discrimination * and *in favor* of Local 28 and JAC. Such a result can hardly be justified under the mandate of Title VII and *Albemarle*.**

Lastly, the explicit rationale of protecting the assets of Local 28 does not support exclusion of whole classes of non-whites. To the extent that any liability for backpay is attributable to the JAC this rationale is inapposite. Further, standards of *eligibility* cannot rationally be based on a single local union's immediate financial circumstances. Such a limitation, if made generally applicable, would frustrate national goals embodied in Title VII. *See Albemarle, supra.* It is submitted that if the District Court may in its discretion take into account individual financial circumstances of unions or employers, it might more properly pro-rate or order deferral of awards rather than eliminate whole categories of non-whites who are the victims of discrimination.***

It is imperative that the District Court's decision setting standards for the award of back pay be reversed and that this Court permit all classes of non-whites, whether

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* For instance, under the District Court's decision, Rupert Jonas—a non-white who was refused entry into Local 28 when his shop was organized and who was subsequently refused an application for direct admission—would not be permitted to make a claim for backpay. Jonas' damages are neither "hypothetical", "speculative" nor "unascertainable" since the record evidence provides a date certain for the inception of damages and the amount. (*Supra*, pp. 22-23.)

** It is submitted that the District Court may have overestimated the difficulties of ascertaining damages. For instance, in the case of apprentices the District Court found that while the test batteries were discriminatory the single mechanical comprehension test which was part of the test was a valid predictor. Thus, a *prima facie* case of injury could be made for an applicant who was not selected on the basis of the test battery score but would have been selected if only the mechanical comprehension scores were used.

*** As the full amount of backpay awards has not yet been determined by the District Court, the question of possible remission or deferral of awards is not now before this Court.

or not there is a "record" of application, to present their evidence of backpay damages to the fact finder. In so doing, the JAC also, of course, should be held liable, where appropriate, for damages caused to non-whites denied admission to the apprentice program.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that (1) those portions of the District Court's Opinion and Order, and Order and Judgment challenged by Local 28 be affirmed, and (2) the portions thereof challenged by the EEOC be reversed with directions to enter an order for backpay against both Local 28 and the JAC in accordance with the opinion of this Court.

Dated: New York, New York
November 10, 1975.

Respectfully submitted,

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Form 260 A-Affidavit of Service by Mail
Rev. 3/72

AFFIDAVIT OF MAILING

CA 75-6079

State of New York) ss
County of New York)

Pauline P. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 10th day of November 19 75s he ~~served a copy of the within~~ two copies of govt's brief and one copy of supplemental joint appendix of the within by placing the same in a properly postpaid franked envelope addressed:

1) Sol Bogen, Esq., One Penn Plaza, NY NY
2) Rosenthal & Goldhaber, Esqs., 44 Court St. Bklyn, NY Attn: William Rothberg, Esq.,
3) W. Bernard Richland, Municipal Bldg., NY NY Attn: Beverly Gross, Esq.,
4) Louis J. Lefkowitz, Two World Trade Center, NY NY Attn: Dominick Tuminaro, Esq.

And deponent further says she sealed the said envelope s and placed the same in the mail ~~chute~~ drop for mailing in the United States Courthouse, Annex, ~~Foley Square~~, Borough of Manhattan, City of New York.
One St. Andrews Plaza

Pauline P. Troia

Sworn to before me this

10th day of November 1975

Patrick H. Barth

PATRICK H. BARTH
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-4526297
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1976